No. 12,679

IN THE

United States Court of Appeals

For the Ninth Circuit

COWDEN LIVESTOCK CO., a corporation,
Appellant-Plaintiff,

vs.

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,
Appellees-Defendants

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona

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JURISDICTIONAL STATEMENT

This is an appeal by Cowden Livestock Co., a corporation, from the final judgment entered on July 5, 1950, in the District Court of the United States for the District of Arizona in an action instituted by appellant, as plaintiff, against Howard Brown, individually and as surviving partner of the copartnership of Sinton

& Brown, and Sinton & Brown, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton, as defendants. The judgment rendered in the court below is in favor of appellant for the sum of $44,794.49 and appellant has appealed therefrom only in so far as the judgment fails to allow and adjudge to appellant the full amount sued for viz: $57,612.53 and in so far as the judgment fails to allow and adjudge to appellant the sum of $6,409.03, representing the portion of the money sued for by appellant which would, upon collection, be payable by appellant to one George Porter (R. 41).

The District Court had jurisdiction under Sections 1391 and 1441 et seq., Title 28, U. S. C. This Honorable Court has jurisdiction under Sections 1291 and 2107, Title 28, U. S. C.

The complaint in the action was filed on February 28, 1948, in the Superior Court of the State of Arizona in and for the County of Maricopa, alleging in two counts that defendants were indebted to plaintiff in the sum of $57,612.53 on account of their failure to remit proceeds of sales of plaintiff's cattle, and on account of their wrongful withholding of the sum of $57,612.53 belonging to the plaintiff (R. 2-5). By timely proceedings, defendants caused the removal of the action to the District Court of the United States for the District of Arizona because diversity of citizenship existed and the matter in controversy exceeded $3,000.00, exclusive of interest and costs (R. 9-17). Thereafter, defendants filed answer to the complaint in the District Court, pleading (a) a general denial, (b) payment by defendant, (c) estoppel, (d) ratification and waiver, and (e) defect of parties plaintiff (R. 19-25).

After trial before the District Court, judgment was entered on July 5, 1950 (R. 31-39. Plaintiff filed its Notice of Appeal and its Bond on Appeal on August 3, 1950, within the time permitted by law (R. 41-45). The record on appeal was filed and docketed in this Court on September 11, 1950, within the time fixed by order of the District Court (R. 55, 332).

STATEMENT OF THE CASE

With the permission of the court, the parties will be referred to here by name or as they appeared in the court below, i.e. appellant as plaintiff and the appellees as defendants.

In the month of February, 1947, plaintiff was the owner of 1214 head of cattle then being fed by plaintiff in the vicinity of Amarillo, Texas, the cattle being in the custody and control of one George Porter (R. 64, 181, 182, 192, 193).

Plaintiff had acquired the cattle by purchase in Arizona in the month of October, 1946, and, at about the time of the purchase, had entered into an oral understanding with Porter and one Roy Adams, pursuant to which the cattle were to be shipped to Porter at Amarillo and to be there fed until ready for market (R. 59, 60, 61, 65). By the terms of the oral agreement, Porter and Adams were to contribute their services, skill and knowledge in the feeding and handling of cattle, plaintiff was to pay all shipping and feeding expenses, and each of the three parties was to receive one-third of the profits made by reason of the feeding operation (R. 65, 67, 108, 111-113, 149). Plaintiff, as owner of the cattle, had the sole right to direct the movement of the same, and the time and manner of their sale or other disposition; and all proceeds from the sale of the cattle were the property of plaintiff (R. 67, 68, 73, 74, 193).

Early in February, 1947, Adams, by telephonic communication with defendants, purported to sell to defendants a one-half interest in plaintiff's cattle (R. 226, 227). Under the agreement between Adams and defendants, defendants were also to advance certain sums to Adams on the remaining one-half of the cattle, finance the feeding and finishing of the entire lot at defendants' yards at Santa Maria, California, and divide with Adams the profits from the sale of the entire lot, after deducting all expenses of feeding and finishing the cattle (R. 227, 228). Im-

mediately following the making of the arrangement by telephone, defendants mailed to Adams, on account of the agreement, their draft in the sum of $16,000.00 (R. 230-233).

In dealing with defendants and making the agreement with defendants, Adams represented that he was the owner of plaintiff's cattle (R. 225). However, plaintiff knew nothing of Adams dealings with defendants and, in fact, at about the time of such dealings, was contemplating moving the cattle to Kansas or to Arizona when the Texas pasture was exhausted (R. 68, 119).

About the middle of March, 1947, Adams represented to plaintiff that he had negotiated an arrangement with defendants under the terms of which plaintiff's cattle could be shipped from Amarillo to defendants at Santa Maria and there fed out for market (R. 69, 72). In this regard, Adams represented to plaintiff that defendants would: (1) advance to plaintiff .15c per pound on the cattle on their arrival at Santa Maria; (2) make a further advance of .01c per pound at the time settlement was completed; (3) pay the freight on the cattle from Amarillo to Santa Maria; and (4) feed the cattle until ready for market at a charge of .50c per head per day for the first 30 days of feeding, .55c per head per day for the second 30 days of feeding, and .60c per head per day for the time required thereafter to ready the cattle for market (R. 74, 75). Adams further represented to plaintiff that, under the arrangement with defendants, upon the sale of the cattle there would be deducted the advances made by defendants, including the freight and expenses of moving the cattle from Amarillo to Santa Maria, and the costs of feeding the cattle, and the profit remaining would be divided between plaintiff and defendants (R. 75, 76). Relying on the representations of Adams as to the arrangement with defendants, plaintiff caused the cattle to be shipped from Amarillo to defendants at Santa Maria in early April, 1947 (R. 76).

Following the delivery of the cattle to defendants, and on May 15, 1947, plaintiff wrote defendants advising that no advances

need be made by defendants on the cattle and expressly directing defendants to make all sales of the cattle for the account of plaintiff and to remit the proceeds to plaintiff (R. 81, 82). Practically contemporaneously with defendants' receipt of this letter from plaintiff, defendants mailed their draft in the sum of $129,314.45 to Roy Adams at Tucson, Arizona (R. 239, 241). Adams did not present this draft for payment or cash the same until July 9, 1947 (R. 239). On May 19, 1947, defendants mailed to Adams at Tucson their check in the sum of $4,843.81 and this check was cashed by Adams on May 24, 1947 (R. 243, 245). On July 5, 1947, defendants delivered to Adams at Santa Maria their additional check in the amount of $19,454.27, which was cashed by Adams on July 8, 1947 (R. 247-249).

In the latter part of May and in early June, 1947, plaintiff on several occasions discussed with Adams the sale of the cattle and finally, through Adams, authorized the sale of the same by defendants (R. 83, 150). On July 8, 1947, plaintiff reached Adams by telephone and was informed that all of the cattle had been sold and that Adams was in possession of settlement figures furnished by defendants. In that telephone conversation, Adams agreed to immediately mail the settlement figures to plaintiff and to meet with plaintiff at Phoenix on July 16, 1947 (R. 84, 85).

The settlement figures mailed by Adams to plaintiff prior to the meeting arranged for July 16, 1947, showed total income from sales of plaintiff's cattle made by defendants in the amount of $240,245.03 (R. 132). According to the arrangement under which plaintiff authorized the delivery of the cattle to defendants, there was deductible from this total income the sum of $47,412.90 for defendants feeding of the cattle, $8,609.14 for freight paid by defendants in transporting the cattle from Amarillo to Santa Maria, and $14,610.45 as defendants' share for the increase in the weight of the cattle, or a total of deductions of $70,632.49 (R. 132-135). Accordingly, the amount due plaintiff was the sum of $169,612.54, out of which the plaintiff would owe

Adams the sum of $6,409.02 and Porter the sum of $6,409.03 for their respective shares of the profits derived from the feeding and handling of the cattle (R. 135).

In either his telephone conversation with Adams on July 8, 1947, or his conference with Adams in Phoenix on July 16, 1947, plaintiff learned for the first time that some payment had been made by defendants to Adams of the proceeds of the sale of plaintiff's cattle (R. 85, 154). Plaintiff, because he understood that the sale of his cattle had been accomplished very recently, assumed that whatever payment had been made by defendants to Adams was also made very recently (R. 97, 141). Plaintiff did not know on July 16, 1947, nor did he learn until some time after August 13, 1947, of the payments made by defendants to Adams on February 14, 1947, May 16, 1947, May 19, 1947, and July 5, 1947 (R. 97, 98, 147, 153).

In the meeting of July 16, 1947, at Phoenix, Adams advised plaintiff that Porter was indebted to Adams, and that he desired to retain the amount which would be payable to Porter for his share of the profits in order to make settlement directly with Porter (R. 95). Accordingly, he proposed to withhold both his share and Porter's share of the profits, or a total of $12,818.05, and to pay over to plaintiff the difference between that sum and $169,612.54, viz: $156,794.49 (R. 95, 96). To accomplish this payment to plaintiff, Adams delivered to plaintiff two checks, one in the amount of $112,000.00 and the other in the amount of $44,794.49 (R. 86). With regard to the $44,794.49 check, Adams explained to plaintiff that he had used a portion of the sales proceeds received by him from defendants to purchase a lot of cattle, which cattle he had sold and from which he would have the proceeds by July 21, 1947 (R. 86, 98). Adams asked, therefore, that the $44,794.49 check be not deposited by plaintiff for payment until July 19, 1947 (R. 86, 98).

Plaintiff did not approve of the manner in which his cattle and the sales proceeds thereof had been handled by Adams and

defendants, and so expressed himself to Adams (R. 86). However, in the belief and with the understanding that defendants had made payment to Adams very recently before July 16, 1947, and that Adams then had the funds from such payment or readily cashable assets representing such funds, plaintiff accepted the two checks (R. 97, 98, 143).

The $112,000.00 check delivered by Adams to plaintiff was promptly cashed by plaintiff (R. 86). The $44,794.49 check was held by plaintiff until July 19, 1947, and then deposited for collection (R. 104). On July 23, 1947, the check was returned to plaintiff unpaid (R. 87). After contacting Adams, plaintiff redeposited the check, and when it was returned the second time unpaid, plaintiff again contacted Adams but was unsuccessful in obtaining payment of the check (R. 87).

The representation made to plaintiff by Adams in their meeting on July 16, 1947, to the effect that Porter was indebted to Adams was false and untrue, and Porter has not been paid anything on account of his share of the profits of the feeding operation (R. 194, 196). Under the terms of a written agreement with Adams, Baca Float Ranch, Inc., a corporation, was the owner of one-half of Adams' share of the profits of the feeding operation, and it also held a written assignment from Adams which covered the other half of such profits (R. 165, 169-174). Notice of the claims of Baca Float Ranch, Inc. to Adams share of the profits was served on plaintiff prior to the institution of this action (R. 176).

On August 9, 1947, plaintiff made demand upon defendants for the amount sued for herein and, payment having been refused, plaintiff filed this suit. The cause was tried in the court below, without a jury, on February 8th and 9th, 1950, and submitted on briefs. Findings of Fact, Conclusions of Law, and Judgment in favor of plaintiff in the sum of $44,794.49, with interest thereon from August 9, 1947, until paid, were entered in the court below on July 5, 1950.

This appeal raises a single question: Did the court below err in failing to enter judgment for plaintiff for the full amount sued for in its complaint, $57,612.53?

SPECIFICATION OF ERROR

1. The District Court erred in failing to render and enter judgment in favor of plaintiff and against defendants for the full amount prayed for in the complaint, viz: $57,612.53, because such judgment was warranted and required by the evidence in the case and the law applicable thereto.

SUMMARY OF ARGUMENT

1. Payment by defendants to Adams of the proceeds from the sale of plaintiff's cattle was not payment to plaintiff, except to the extent that such proceeds were actually received by plaintiff from Adams.

2. Plaintiff never received $57,612.53 of the proceeds from the sale of his cattle; and he is, therefore, entitled to judgment against defendants in that amount.

3. The fact that Adams would have been entitled, upon plaintiff's collection of the proceeds from the cattle, to receive from plaintiff the sum of $6,409.02 as his share of the profits from the feeding operation, did not render the payment of that sum by defendants to Adams a payment pro tanto by defendants to plaintiff.

ARGUMENT

The evidence adduced upon the trial of this cause showed, and the trial court found:

> (a) That plaintiff had the sole right to direct the movement of the cattle involved herein, their disposition, and the time and manner of the sale thereof, and all proceeds from the sale of the cattle were the property of plaintiff, subject to an accounting to Roy Adams and George Porter as to

the profit derived from the feeding operation; that the title to the cattle at all times remained in plaintiff (R. 33, 67, 68, 73, 74, 193).

(b) That subsequent to the delivery of the cattle to defendants at Santa Maria, plaintiff directed defendants in writing to sell the cattle for the account of plaintiff and to remit the proceeds to plaintiff (R. 34, 81, 82).

(c) That in accepting Adams checks in the amounts of $112,000.00 and $44,794.49, plaintiff did not know all of the circumstances surrounding the transactions between Adams and defendants and assumed that defendants had settled with Adams after the sale of the cattle; that plaintiff did not know that Adams had represented himself as the owner of the cattle and did not know that Adams had purported to sell the cattle in February, 1947; and that plaintiff accepted Adams checks conditionally upon their being honored and paid when presented for payment (R. 36, 86, 97, 98, 143, 147, 153).

(d) That plaintiff, in accepting Adams checks, did not ratify or intend to ratify Adams unauthorized representations that the cattle belonged to him, or Adams representations that he was entitled to sell the same and collect the proceeds thereof, either for his own account or for the account of the plaintiff (R. 37, 97, 98, 147, 153).

The foregoing evidence and findings clearly establish that there was no authority, real or apparent, in Adams to receive payment for plaintiff, and that plaintiff did not ratify Adams action in collecting the proceeds of the cattle or any representations which Adams may have made to defendants as to his authority to collect such proceeds. It follows, therefore, that defendants made payment to Adams at their own risk, and any sums paid to him which were not received by plaintiff did not constitute a payment to

plaintiff by defendants of their obligation to remit to plaintiff the proceeds of the cattle sales.

40 Am. Jur., Sec. 24, p. 728

And since the full amount due to plaintiff and never received by him is the sum of $57,612.53, the judgment for plaintiff below should have been in that amount and not in the amount of $44,794.49.

It may be contended that, inasmuch as Adams was the recipient of the monies paid by defendants, and plaintiff would have been obligated upon receipt of the monies to pay $6,409.02 to Adams as his share of the profits on the feeding operation, the payment by defendants to Adams satisfied plaintiff's obligation to Adams and should, to the extent of $6,409.02, therefore, be held to constitute payment by defendants to plaintiff. But the mere fact that an owner of property, after he collects the proceeds from a sale thereof, may be obligated to pay to third parties having no ownership or interest in the property, certain sums of money computed and determined in relation to the amount received by the owner, in payment for services rendered in connection with the property by such third parties, does not justify or permit payment of the sales proceeds, or any part thereof, to such third parties; and payment of the sales proceeds, or any part thereof, to such third parties is not a defense in an action by the owner of the property to recover the sales proceeds.

Linville v. Jones, 137 S. W. 415 (Tex. Civ. App. 1911);

Harrison v. Moran, 163 Mass. 495, 40 N. E. 850 (1895);

Martin v. Sharp & Fellows Contracting Co., 34 Cal. App. 584, 168 P. 373, 375 (1917);

Caskie v. Philadelphia Rapid Transit Co., 334 Pa. 33, 5 A. 2d 368, 372 (1939).

Moreover, in the case at bar the fact is that Baca Float Ranch, Inc. was entitled to receive all of the profits earned by Adams in the feeding operation, and prior to the institution of this action it asserted to plaintiff its claim to such profits (R. 165-177).

Certainly, no reduction of defendants' obligation to plaintiff can be justified merely because under the feeding operation among plaintiff, Porter and Adams, Porter was entitled upon the sale of the cattle and the receipt by plaintiff of the sales proceeds, to his share of the profits in the sum of 6,409.03. It is true that at the meeting between plaintiff and Adams at Phoenix on July 16, 1947, plaintiff agreed to permit Adams to settle directly with Porter; but it is equally true that this agreement was obtained solely by Adams false statement to plaintiff that Porter was indebted to him (R. 95, 96, 194, 196). Porter has not been paid, by Adams or anyone else, and he is looking to plaintiff to collect the proceeds of the sale of the cattle and to account to him for his share of the profits (R. 196). Plaintiff has both the obligation and the right to collect the proceeds and account to Porter.

We submit that the judgment below should be modified to provide for the recovery by plaintiff from defendants of the sum of $57,612.53, with interest thereon at the rate of 6% per annum from August 9, 1947, until paid; and that, as so modified, said judgment should be by this Honorable Court affirmed.

Respectfully submitted,
SNELL & WILMER
MARK WILMER
JAMES A. WALSH.
Attorneys for Appellant-Plaintiff

APPENDIX

(Included here because of its omission from the record as originally printed.)

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS RELIED UPON BY APPELLANT, COWDEN LIVESTOCK COMPANY

Pursuant to the requirements of Rule 19(6) of the Rules of Practice of this Court, appellant, Cowden Livestock Company, herewith files with the Clerk of this Court the following concise statement of the points upon which it will rely as appellant herein:

This action is one wherein appellant as plaintiff in the trial court sought recovery for certain cattle alleged to have been the property of appellant, which livestock had been sold by appellees, defendants below, without making proper accounting and remittance to appellant. There was no dispute in the evidence offered in the trial court to the effect that the cattle were the property of appellant, Cowden Livestock Company, and there was likewise no dispute that Cowden Livestock Company had the sole right to authorize the sale of said cattle and the sole right to collect and receive proceeds of such sales. It appeared that one George Porter and Roy Adams were entitled to receive payment for their services in connection with the handling and feeding of these cattle, based upon the percentage of profit made in the handling and sale of said cattle, which said compensation and payment was to be made by Cowden Livestock Company, appellant herein, after making sale of said cattle, collecting the proceeds and deducting certain expenses incurred and paid by Cowden Livestock Company.

The evidence was undisputed that Roy Adams represented himself as owner of the cattle to defendants and appellees, without authority from Cowden Livestock Company and was paid the proceeds legally due Cowden Livestock Company by defendants

and appellees herein, without authority from appellant. Roy Adams paid over to appellant, Cowden Livestock Company, a portion of these proceeds without disclosing to Cowden Livestock Company, the circumstances under which he had secured such funds from appellees. Said Roy Adams had theretofore been associated in other business undertakings with said George Porter and represented to Cowden Livestock Company that Porter was indebted to him and that it would be satisfactory with Porter if Adams retained Porter's compensation out of the sales proceeds, which Adams did. This representation was false.

The portion of the proceeds of the sales of these cattle turned over to Cowden Livestock Company by Adams was paid over by two checks which represented the proper part of the sales price due Cowden Livestock Company, less the compensation due Adams and Porter.

These checks were accepted by Cowden Livestock Company in ignorance of the true state of facts and in the belief that Adams actually had currently received the funds due from the sale of the cattle and had such funds in his possession or available for payment of the checks and unaware that defendants had ignored a letter of instructions from Cowden Livestock Company to appellees sent and delivered some two months previously, directing that sales of these cattle should be for the account of Cowden Livestock Company and proceeds remitted to Cowden Livestock Company.

One of these checks was not paid, whereupon plaintiffs made demand on defendants for payment of the balance due and upon refusal of defendants to make full payment, brought this action.

The trial court, among other Finding of Fact, made Finding No. 4:

> " * * * that plaintiff had the sole right to direct the movement of said cattle, their disposition, and the time and manner of the sale thereof, and all proceeds from the sale of

said cattle were the property of plaintiff, subject to an accounting to said Roy Adams and George Porter as to the profit derived from such feeding operation; that the title to said cattle at all times remained in plaintiff."

Accordingly, it is the position of this appellant, that, as a matter of law, it was and is entitled to recover the full amount due from appellees upon the sale of said cattle or, in any event, the additional amount of such proceeds for which it would be accountable to George Porter and that the judgment as entered was and is erroneous to the extent it failed to allow such proper recovery.

Appellant, Cowden Livestock Company, relies upon the point and legal proposition that only the owner of personal property can authorize its sale and only the owner may collect and receipt for the sales proceeds; the mere fact that after the owner collects the sales proceeds he may be under obligation to pay to third parties who have no ownership or interest in such personal property, certain sums of money computed and determined in relation to the amount received by the owner, in payment for services rendered in connection with, or work performed upon such personal property by such third parties, does not justify or permit payment of the sales proceeds or any part thereof to such a third party and payment of such sales proceeds, or any part thereof, to such third party is not a defense in an action by the owner of such personal property to recover the sales proceeds.

Respectfully,

SNELL & WILMER,
By /s/ MARK WILMER,
/s/ JAMES A. WALSH,
Attorneys for Appellant,
Cowden Livestock Company.

[Endorsed]: Filed September 25, 1950.

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STATEMENT OF THE CASE

As the Court is aware, appellee-plaintiff is also prosecuting in this cause an appeal from the judgment rendered below by the District Court. As appellant, it has heretofore filed its Opening Brief and has set out therein its Statement of the Case. Accordingly, though we are not in entire agreement with the Statement of the Case contained in the Opening Brief of appellees-

defendants, we will not here burden the Court with a discussion of such Statement but respectfully direct the attention of the Court to the Statement of the Case made in our Opening Brief as appellant.

Hereafter, with the permission of the Court the parties will be referred to by name or as they appeared in the court below, i.e. appellants as defendants and appellee as plaintiff.

For the convenience of the Court in following our argument, we will preface each separate phase thereof with a re-statement of defendants' numbered Proposition to which our argument is directed.

ARGUMENT

I. The District Court Should Have Dismissed Plaintiff's Complaint for Nonjoinder of the Indispensable Parties-Plaintiff, the Plaintiff's Joint Venturers (Specifications I and V(A)).

It is evident from the mere statement of defendants' Proposition I that the same is bottomed entirely upon the assumption that Porter, Adams and plaintiff were in this case joint venturers. If defendants are wrong in this fundamental assumption then, of course, the entire Proposition must fall.

We submit that there is absent from this case one of the indispensable elements of a joint adventure, viz: joint control, or the equal right of each of the parties in the management and conduct of the undertaking. The authorities are legion upon the proposition that if the will or pleasure of one party is to control the others with respect to how, when, and where the agreement among them is to be performed, there is no joint adventure.

Balestrieri & Co. v. Commissioner, 177 F. 2d 867, 871 (CCA 9, 1949);

Carboneau v. Peterson, 1 Wash. 2d 347, 95 P. 2d 1043, 1055 (1939);

Beck v. Cagle, 46 Cal. App. 2d 152, 115 P. 2d 613, 618 (1941);

Rae v. Cameron, 112 Mont. 159, 114 P. 2d 1060, 1065 (1941);

48 *C.J.S.,* Sec. 2, p. 810, n. 77.

Here, plaintiff had the sole right to control the movements of the cattle, the exclusive right to say when and how they should be sold or otherwise disposed of, and the sole right to receive the proceeds from the sale of the cattle (R. 74, 73, 67, 68, 113, 183, 193, 204). In other words, plaintiff alone had the power to make the decisions which would control the carrying out of the arrangement between himself, Porter and Adams. Accordingly, under the authorities above cited, no joint adventure existed in this case.

It should be noted that this is not a case where control initially existed jointly in the three parties but was by agreement placed or entrusted solely in the hands of plaintiff. Here, from the very inception of the arrangement among plaintiff, Porter and Adams, plaintiff, as owner of the cattle, retained the sole right to make the decisions which controlled the arrangement among the parties, and no right of control existed in either Porter or Adams (R. 74, 73, 67, 68, 113, 183, 193, 204).

Cf. *U. S. F. & G. Co. v. Dawson Produce Co.,* 200 Okla. 540, 197 P. 2d 978, 982 (1948).

But even if we were to concede, for argument's sake, that a joint adventure to any extent existed among Porter, Adams and plaintiff, such concession will avail defendants nothing, for it is well established that where a claim belongs to a partner or joint adventurer in his own right, he may sue alone thereon.

Wesson v. Galef, 286 F. 621, 622 (D.C.N.Y., 1922);

Beaumont Pasture Co. v. Sabine & E. T. Ry. Co., 41 S.W. 543, 544 (Tex. Civ. App., 1897);

Weikel v. Clarke, 33 Ky. L. 290, 109 S.W. 894, 895 (1908);

Knowles v. Sullivan, 182 Mass. 318, 65 N.E. 389 (1902);

47 *C.J.,* Sec. 472, p. 958, n. 4;

68 *C.J.S.,* Sec. 208, p. 680, n. 31, 32;

Cf. *Ross v. Willett,* 27 N.Y.S. 785, 786 (1894);

Cf. *Budd v. Scudder,* 52 N.J. Eq. 320, 26 A. 904, 905-906 (1893).

In this case the undisputed evidence shows, and the court below found, that plaintiff was at all times the sole owner of the cattle involved herein (R. 33, 73, 102), that plaintiff had the sole right to sell the same (R. 33, 74, 113, 193), and the sole right to receive the proceeds of any sale (R. 33, 193, 183). Clearly, plaintiff being the sole owner of the cattle and being the only person authorized to receive the proceeds from their sale, it is the only proper party plaintiff in this action.

II. The Plaintiff Has Received Payment of All Monies to Which It Is Entitled (Specifications II and V(A), (B) and (C)).

A. ADAMS, AS JOINT VENTURER OR AGENT OF PLAINTIFF, WAS AUTHORIZED TO RECEIVE THE MONIES PAID BY DEFENDANTS.

The first half of defendants' argument under Subdivision A of its Proposition II may be summarized as follows: There being no testimony in the record directly denying that Adams had authority to collect the proceeds of the sale of plaintiff's cattle, Adams, as agent for the plaintiff, had implied authority to collect such proceeds from defendants.

Defendants' statement that the record is barren of testimony directly denying Adams' authority to receive the sales proceeds is, we submit, not in accordance with the fact. Defendants are com-

pletely overlooking the testimony of Ray Cowden that, in a discussion with Adams which took place at the time plaintiff first learned that defendants had paid to Adams some part of the proceeds of the sale of the cattle, Cowden expressed dissatisfaction with the way the matter had been handled and reminded Adams that the sale of the cattle had been authorized by plaintiff on the basis that payment would be made to plaintiff (R. 86).

Further, defendants also overlook the testimony in the record to the effect that Adams himself informed Porter that all sales monies were to be sent to plaintiff (R. 193). No clearer or more conclusive proof of Adams' lack of authority to receive payment could be found than his own statement in that regard.

But even if the record were not thus clear regarding Adams' lack of authority to receive payment for plaintiff's cattle, defendants' argument is pointless under the facts in the case *because Adams never received or purported to receive monies from defendants as agent for plaintiff, or as agent for anyone else, but received such monies solely on his own account.*

The uncontroverted evidence in this case discloses that Adams, early in February, 1947, without the knowledge of plaintiff but purporting to be the sole owner of plaintiff's cattle, entered into an agreement with defendants which included the sale by Adams to defendants of a one-half interest in the cattle and an arrangement whereunder defendants would feed and finish the entire lot of cattle at their yards in Santa Maria, California (R. 225-228, 119). The undisputed evidence shows, also, that this agreement was made between Adams and defendants, and $16,000.00 was paid under the agreement by defendants to Adams as the purported sole owner of the cattle, more than one month before Adams ever broached to plaintiff the subject of a feeding and finishing arrangement, or any other arrangement, with defendants (R. 69, 72). Further, every dollar of the $169,612.53 collected by Adams from defendants was received by Adams on his own account,

in his own name, without the knowledge of plaintiff, and in violation of plaintiff's rights and interests (R. 230-234, 239-249, 147, 153).

In addition, plaintiff did not learn the facts regarding Adams' claim of sole ownership of the cattle and his sale of a one-half interest therein to defendants until the Fall of 1947, long after Adams had received all of the payments made to him by defendants (R. 119); and plaintiff did not learn the facts regarding the payments made by defendants to Adams pursuant to the agreement between them until some date after August 13, 1947 (R. 97, 98, 147, 153).

The rule is fundamental, we submit, that implied power can exist in an agent only with regard to actions or conduct which are usually or necessarily connected with the accomplishment of the purposes of the agency, and which are consistent with the best interests of the principal; and an act which is adverse to the interests of the principal, and done by the agent solely for the advancement of his own interests and purposes, is clearly outside any implied power of the agent.

American Southern Trust Co. v. McKee, 173 Ark. 147, 293 S.W. 50, 58 (1927);

2 *C.J.,* Sec. 222, p. 582, n. 5;

2 *C. J. S.,* Sec. 99, p. 1229, n. 72;

2 *Am. Jur.,* Sec. 87, p. 71;

Adams' express powers and duties under the arrangement among himself, Porter and plaintiff in this case were the following: to assist in securing a buyer for plaintiff's cattle; to arrange for shipment of the cattle after plaintiff had authorized shipment; to assist in securing feed; to inspect the cattle periodically and report on their progress; and to give plaintiff and Porter the benefit of his experience and judgment in carrying out the

arrangement among them (R. 111-113). Surely, it will not be contended in seriousness that an agent having such express powers and duties would customarily or necessarily possess, in order to accomplish the purpose of his employment, the implied power to secretly claim the sole ownership of his principal's property and to attempt to dispose of it in his own name and for his own account and purposes.

The authorities cited by defendants at pages 24-26 of their brief would be of some value if we had involved here an agent empowered to sell and the only question presented was the implied power of such agent to collect the proceeds of the sale. But to insist that such authorities establish the rule that an agent authorized to sell thereby obtains the implied authority to convert the principal's property to his own use and, indeed, to purport in his own name to sell an interest therein, is wholly untenable.

At pages 27-28 of their brief, defendants point to particular facts and circumstances in this case which, they contend, support the implication that Adams had power to receive from defendants the proceeds of the sale of plaintiff's cattle. The facts and circumstances are: (1) That Adams may have on former occasions handled and transmitted to plaintiff the proceeds of cattle sales; (2) That plaintiff's bank had cashed a draft executed on behalf of plaintiff by Adams; and (3) That Adams was authorized to show and, subject to plaintiff's advance approval, to sell plaintiff's cattle.

We are confident that it will not be held to be the law that the grant by a principal of authority to his agent to handle and transmit sales proceeds, or to draw drafts, or to show and consummate the sale of cattle, carries with it the implied power in the agent to claim the principal's property as his own, to deal with it in his own name and for his own purposes, and even to sell it without the knowledge of the principal but for his own account.

The latter part of defendants' argument under Subdivision A, Proposition II, is devoted to the contention that by accepting Adams' check for $44,794.49 on July 16, 1947, and attempting thereafter for several weeks to obtain payment of said check, plaintiff acquiesced in Adams' collection of the sales proceeds from defendants and thereby vested in Adams the implied authority to collect such proceeds.

Defendants tacitly concede, in the last paragraph on page 31 of their brief, that their position can be maintained only if plaintiff, at the time of his alleged acquiescence, had knowledge of all material facts regarding Adams' receipt of the monies from defendants. But, admittedly, when plaintiff received Adams' check for $44,794.49 it did so with the definite and proper belief and understanding that the sale of its cattle had been made for its account and had been accomplished very recently (R. 97, 141). It believed, also, and with reason, that whatever payment had been made by defendants to Adams had been made very recently (R. 97, 141), and that Adams then had available the funds from such payment or readily cashable assets representing such funds (R. 97, 98, 143). Plaintiff did not know until the early Fall of 1947 that Adams had in February, 1947, purported to deal with the defendants as sole owner of the cattle and to sell a one-half interest therein to defendants (R. 119); and plaintiff did not know until some date after August 13, 1947 that Adams, purporting to be sole owner of the cattle, had been paid monies by defendants on February 14, 1947, May 16, 1947, May 19, 1947, and July 5, 1947 (R. 97, 98, 147, 153).

Clearly, the plaintiff being thus ignorant of the facts and circumstances under which Adams received the monies from defendants, it cannot be contended that he acquiesced in such receipt.

B. PLAINTIFF ACCEPTED PAYMENT AND OTHER PERFORMANCE BY ADAMS AS FULL SATISFACTION OF ANY CLAIM AGAINST DEFENDANTS.

The long and short of defendants' argument under this Subdivision is that plaintiff accepted Adams' check for $44,794.49 in

full payment of the proceeds due plaintiff from the sales of its cattle and that, consequently, plaintiff has no claim against defendants.

It is, of course, possible for a creditor to agree to discharge a debt by the acceptance of a check; but such discharge occurs only when the creditor has in fact so agreed, and the presumption is that the check is accepted on condition that it shall be paid.

Empire-Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 P. 464, 466 (1919);

40 *Am. Jur.,* Sec. 72, p. 763.

Unfortunately for defendants' position, in this case the evidence is undisputed, and the trial court found, that plaintiff accepted the check only upon the understanding and condition that it would be paid when presented (R. 36, 97, 98). Obviously, since the check was so conditionally accepted and it was not paid, it could not have the effect of discharging any indebtedness owing to plaintiff.

III. The Defendants Are Innocent Parties in This Matter, and Since It Was Plaintiff's Acts and Acquiescence for More Than Three Weeks in Adams' Collections of the Monies in Question Which Caused the Loss, Plaintiff Must Bear That loss (Specifications III and V(B)).

On May 15, 1947, plaintiff wrote to defendants at their office in Santa Maria, California, and in its letter plainly advised defendants that when sales were made of the cattle involved in this action, such sales were to be made for the account of plaintiff and the proceeds were to be remitted to plaintiff at the address given in plaintiff's letter (R. 81). Defendants' receipt of this letter about May 16, 1947, and their cognizance of plaintiff's directions regarding the sale of the cattle and the disposition of the proceeds therefrom, is admitted by one of the defendants, Dean Brown (R. 92, 218). That defendants elected to ignore plaintiff's notice and request is undisputed (R. 92, 83). Consequently, the finding by the trial court that defendants were upon notice of facts

sufficient to cause a reasonable person to make inquiry as to the true ownership of the cattle (R. 36), is amply supported and justified by the evidence.

Notwithstanding the notice given by plaintiff to defendants, defendants on approximately the same day they received plaintiff's letter mailed to Adams at Tucson their draft for the sum of $129,314.45 (R. 239, 241). Adams did not present this draft for payment or cash the same until July 9, 1947 (R. 239). On May 19, 1947, defendants mailed to Adams at Tucson their check in the sum of $4,843.81 and this check was cashed by Adams on May 24, 1947 (R. 243, 245). On July 5, 1947, defendants delivered to Adams at Santa Maria, California, their additional check in the amount of $19,454.27, which was cashed by Adams on July 8, 1947 (R. 247-249).

In the light of these facts, it is plain that the entire loss involved in this case is due solely to the negligence or willfulness of defendants in completely ignoring the notice given to them by plaintiff in its letter of May 15, 1947. The $129,314.15 draft which was mailed to Adams at about the same time that defendants received plaintiff's letter, was outstanding for almost two months, and defendants had ample opportunity, if they acted prudently or reasonably, to have stopped payment thereon (R. 286). All of the payments made by defendants to Adams subsequent to May 16, 1947, could have been avoided and, undoubtedly, the $16,000.00 payment made to Adams by defendants on February 14, 1947 could have been recouped by defendants.

Defendants, recognizing that the loss here involved is directly traceable to their willful or negligent disregard of plaintiff's advice, attempt to escape responsibility therefor by contending that plaintiff had a later opportunity to prevent such loss. In this regard, defendants make the bland statement, at page 36 of their brief, that on July 16, 1947, plaintiff knew all of the material facts pertaining to Adams' collection of monies from defendants.

This statement is simply not true, as we have hereinbefore demonstrated (*ante,* p. 8).

Defendants further contend that plaintiff knew on July 16, 1947, that Adams had available certain cattle and that plaintiff should have given defendants an opportunity to attach these cattle. In the first place, plaintiff was never informed that Adams had any cattle available for attachment on July 16, 1947, plaintiff's information in this regard being Adams' statement that he had sold some cattle, from which he would have the proceeds by July 21, 1947 (R. 86, 98). In any event, there is no evidence in the record definitely establishing that Adams ever had the cattle which he purported to plaintiff to have sold, or that he had any proceeds coming from the sale of such cattle, the clear inference from the record being that Adams' story to plaintiff was a complete invention devised by Adams in order to postpone plaintiff's discovery of the actual facts regarding his appropriation of plaintiff's cattle.

We submit that the record is, as the trial court found (R. 36), completely devoid of any evidence that defendants suffered detriment or disadvantage by virtue of plaintiff's receipt of Adams' check and its attempts to collect the same; and we submit further, that the record conclusively establishes that the loss involved here occurred wholly and solely by reason of defendants' failure to act prudently and reasonably in the light of the facts brought to their knowledge by plaintiff in its letter of May 15, 1947.

IV. The Plaintiff in Settling with Adams, Accepting His Checks, and Acquiescing Thereafter for More Than Three Weeks in Adams' Collection of the Monies, Thereby Ratified His Collections (Specifications IV and V(C)).

Defendants have prefaced their argument under Proposition IV with what they claim are conclusions supported by the record in this case (Appellants' Opening Brief, p. 37). We disagree emphatically with defendants' statement, and we will here repeat the alleged conclusions, with our answer to the same.

(1) "Plaintiff, on July 16, 1947, knew all of the material facts pertaining to Adams' collections." The inaccuracy of this statement is apparent from our discussion of the evidence in the record in our argument of Proposition II (*ante,* p. 8).

(2) "Plaintiff approved and affirmed these acts of Adams." Obviously, since plaintiff did not know the facts regarding Adams' collections from defendants, he could not have approved or affirmed Adams' acts in that regard.

(3) "Adams in making the collections was intending to act for and on behalf of the plaintiff-Porter-Adams arrangement." We have heretofore pointed out that every dollar collected by Adams from defendants was received by Adams on his own account, in his own name, without the knowledge of plaintiff, and in violation of plaintiff's rights and interests (*ante,* pp. 5, 6).

(4) "While Adams in making the collections did not purport to defendants to be acting for and on behalf of plaintiff, defendants knew at the time that they paid over the monies to Adams that he was acting for and on behalf of plaintiff." This statement is directly at variance with the testimony of defendant Howard Brown (R. 260), and the testimony of defendant Dean Brown (R. 216). There is no testimony anywhere in the record that defendants ever knew or dealt with Adams other than as the sole owner of the cattle.

Defendants concede that under the rule applied by the majority of courts the question of ratification by plaintiff of Adams' collections from defendants is simply not in this case, because Adams never purported to defendants to be other than the sole owner of the cattle at the time he received the collections. Defendants desperately attempt, however, by reference to criticisms of the majority rule, to persuade the court to open the door that is locked to them. We think it a sufficient answer to defendants' argument to point out that the merits and demerits of both the ma-

jority and minority rules have been studied and considered by the courts of this country for a half century past, with the result that the courts of but two states—Massachusetts and Washington—have professed to find anything of merit in the rule for which defendants here contend. Surely, if the minority views were as logical and sound as defendants would persuade the court, a half century of consideration would not have left them the rule in but two jurisdictions.

Apart from the fact that Adams did not purport to defendants to be an agent, there are additional reasons why ratification is not in this case. In the first place, defendants concede that even under the rule followed in Massachusetts and Washington, it is necessary in order to have a ratification that the act should have been done by one who was *in fact* acting as an agent. Here, Adams in making collections from defendants was acting solely for himself, for his own purposes, and contrary to the interests of plaintiff.

In addition, it is fundamental law that in order for a ratification of an unauthorized act or transaction of an agent to be binding and valid, the principal must have full knowledge, at the time of the ratification, of all material facts and circumstances relating to the unauthorized act or transaction. In Arizona, this rule is established to the extent that ratification of an unauthorized act of an agent is not valid and binding where the principal has misunderstood or mistaken material facts, even though he may have wholly omitted to make inquiry concerning them, and his ignorance and misunderstanding might have been corrected by the use of diligence on his part to ascertain the true material facts.

Valley Bank of Phoenix v. Brown, 9 Ariz. 311, 83 P. 362, 364 (1905);

Mutual Benefit H. & A. Ass'n v. Neale, 43 Ariz. 532, 33 P. 2d 604, 608 (1934);

2 *C.J.S.,* Sec. 42, p. 1081 et seq.

In this case, the conduct of plaintiff which defendants contend amounted to ratification, i.e. plaintiff's acceptance of Adams' check for $44,794.49, was performed by plaintiff while it was under a thorough misapprehension of the facts regarding Adams' collections from defendants and while it was without any accurate knowledge regarding material facts relating to such collections by Adams from defendants (R. 97, 98, 119, 141, 147, 153). Obviously, therefore, under the rules of law applicable, no valid or binding ratification of Adams' acts was made by plaintiff.

CONCLUSION

Plaintiff most respectfully insists that the judgment of the District Court is proper and right and should be affirmed.

Respectfully submitted,

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